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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 336

JAMES H. McKEE,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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PRIESMAN GRAPHICS—OMAHA, NEBRASKA

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THE STATE OF NEBRASKA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

Petitioner seeks a Writ of Certiorari to review the judgment of the Supreme Court of the State of Nebraska entered in the captioned case on January 24, 1969.

OPINION BELOW

The opinion of the Supreme Court of Nebraska (Appendix A, p. 11) is reported at 183 Neb. 754, 164 N.W. 2d 434. Petition for a rehearing was filed and denied without opinion on March 17, 1969.

JURISDICTION

The opinion and judgment of the Supreme Court of Nebraska was entered on January 24, 1969. Rehearing was denied on March 17, 1969. By order dated June 11, 1969, Mr. Justice White extended until July 15th, 1969, the date within which a petition for certiorari in this case might be filed with this Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1257(3).

QUESTIONS PRESENTED

This was a criminal prosecution wherein petitioner McKee was convicted of feloniously receiving goods of the value of over one hundred dollars, knowing that they had been stolen and with intent to defraud the owner thereof. Nebraska Statute 28-508, R.R.S. 1943, provides that if the goods feloniously received are of value over one hundred dollars the offense is a felony. Nebraska Statute 28-513, R.R.S. 1943, provides that if the value of the goods received is less than one hundred dollars the offense is a misdemeanor.

The trial court in its instructions to the jury did not require it to find the value of goods allegedly received.

The questions presented are:

1. Where Statutes make it a felony to receive stolen goods valued at more than one hundred dollars and a misdemeanor if the goods are valued at less than one hundred dollars, was petitioner denied a fair trial and due process of law when the trial court did not require the jury to find the value of the goods allegedly received?

2. Was petitioner denied a fair trial and due process of law when the prosecution failed to prove an essential element of the offense beyond a reasonable doubt?

3. Was petitioner denied Sixth Amendment rights to a fair trial when he was found guilty of receiving stolen property and the prosecution did not produce evidence to establish guilty knowledge?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and the Nebraska State Statutes are set forth in Appendix B, p. 18).

STATEMENT OF THE CASE

This was a criminal action brought in the District Court of Platte County, Nebraska, under an Information which charged that on May 23rd, 1967, Petitioner feloniously received goods of the value of over one hundred dollars, with intent to defraud the owners thereof, and knowing that said goods had been stolen. The issue of guilt or innocence was tried to a jury and it returned a general verdict of guilty. Petitioner was sentenced to a term of imprisonment for a period of eighteen (18) months.

The evidence established that Ferer's Tobacco & Candy Company was burglarized of approximately 60 cases of cigarettes; that the company did not sell at wholesale in Platte County, Nebraska where the prosecution was initiated but did sell cigarettes in Nebraska and Iowa and that each package of cigarettes sold was stamped with the company's exclusive assigned stamp. The evidence further established that the cigarettes in question were found in Platte County, Nebraska in the possession of the petitioner.

Mr. Meyer Ferer testified that he sells cigarettes to vendors in Iowa and Nebraska, moves about 150 cases per week, and had no knowledge where the vendors circulated the cigarettes. Other than the stamp there were no distinguishing marks on the cigarettes that would distinguish them from every other cigarette package which went through his wholesale business. Mr. Ferer could not identify the cigarettes in question as the same cigarettes that had been stolen from his warehouse. This was the only evidence relative to "stolen property" and "knowledge that goods had been stolen", other than one witness who purchased some cigarettes from petitioner at 49 cents less than the going wholesale price.

The prosecution failed to establish scienter. It was never established that petitioner had knowledge that the property received was stolen *at the time of the receipt thereof*. The trial Court failed to instruct that it was the duty of the State to establish by the evidence beyond a reasonable doubt that petitioner knew the cigarettes had been stolen at the time he allegedly received them. No witness testified to this fact.

The case was submitted to the jury for a verdict of guilt or innocence and the jury was not required to find the value of the alleged stolen property. The jury fould petitioner guilty of receiving stolen property.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of Nebraska has disregarded Nebraska Statutes and its own decisions in affirming petitioner's conviction.

The verdict returned by the jury is fatally defective for the reason that it merely found the appellant guilty and did not make a finding as to the actual value of the goods allegedly stolen and received by the petitioner. Therefore, the verdict is

absolutely null and void under R.R.S. Nebraska, 1943, Section 29-2026.01, which states:

> "Jury verdict; finding of value of property; when required. When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in its verdict the value of the property stolen, embezzled, or falsely obtained."

In the case of *Hogoboom v. State,* 120 Neb. 525, 234 N.W. 422, the Court said that the value of the property constitutes an essential element of the charge, and that a conviction cannot be sustained without determination in the verdict of the value of the property in question.

In *State v. Houp,* 182 Neb. 298, 154 N.W. 2d 465, the rule is:

> " . . . a verdict in a larceny case which does not determine the value of the property stolen will not support a sentence . . . We have held that such a verdict confers no authority upon the trial court to enter a judgment or sentence . . . "

The Court went on to say that since the jury did not ascertain and declare in its verdict the value of the property stolen as required by Section 29-2026.01, R.S. Supp. 1965, the verdict of this case was the equivalent of a mistrial.

The purpose of requiring the state to prove and the jury to find the actual value of the goods received (R.R.S. Nebraska, 1943, Section 29-2026.01) is clear when the statutes on offenses relating to property are examined. 28-508, R.R.S., 1943 provides that "Whoever receives or buys goods or chattels of the value of one hundred dollars, or upwards * * * shall be imprisoned in the Nebraska Penal and Correctional Complex

not more than seven years nor less than one year." This statute makes it a felony if the goods received are of a value of one hundred dollars or upwards.

28-513, R.R.S., 1943 provides "Whoever receives or conceals any stolen property, goods, * * * of less value than one hundred dollars * * * shall upon conviction thereof, be fined for every such offense not more than one hundred dollars, or be imprisoned in the county jail not more than thirty days." This statute makes it a misdemeanor if the goods received are of a value of less than one hundred dollars.

The Nebraska Supreme Court, in its opinion (183 Neb. 754, 759), held that, under the evidence, no finding of receiving stolen property in a value of less than $100.00 could have been made consistent with a verdict of guilty. That Court further stated that the only verdicts possible, as the trial Court submitted the case, were guilty as charged or not guilty. However, the trial Court, in its instructions, did not instruct the jury that if they found the appellant did receive goods that had been stolen and that the value of the goods was less than $100.00, they must acquit the defendant.

The Court distinguished the above cited statutes from the statutes dealing with larceny, holding that under the larceny statutes, a finding of the value of the property must be made by the jury because the Court must know for what offense it is necessary to pass judgment and sentence on. The Court went on to hold that the statute involved here (28-508, R.R.S. Nebraska, 1943) describes a specific offense, that of receiving stolen property of a value of more than $100.00 with the intent to defraud. It does not permit a determination as to degrees of guilt proportionate to the amount of property stolen. This, we contend, is error, since 25-508, R.R.S. Nebraska, 1943, defines a felony if goods received are of value of $100.00 or more; and

28-513, R.R.S. Nebraska, 1943, describes a misdemeanor if the goods received are of a value of less than $100.00. The mere allegation of receiving stolen property over $100.00 is not sufficient, since value is one of the essential elements to be proved beyond a reasonable doubt; and the jury must make this actual determination and set it out in its verdict before the Court can pass judgment and sentence of a felony or a misdemeanor on that verdict.

2. The Nebraska Supreme Court made erroneous findings on the evidence in holding that the prosecution had established the essential elements of the offense beyond a reasonable doubt. The Nebraska Supreme Court found that the evidence " * * * shows that the exhibits, representing cigarettes, were the same cigarettes stolen * * * ." 183 Neb. 754, 164 N.W. 2d 434 at 437. No one testified that the cigarettes were the same as the ones stolen and the owner of the warehouse that was burglarized stated he could not say the exhibits were the same cigarettes that were stolen.

The Supreme Court of Nebraska has held:

> "The test by which to determine the sufficiency of the evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt." *Sedlacek v. State,* 166 Neb. 736, 90 N.W. 2d 340; *Mogan v. State,* 51 Neb. 672, 71 N.W. 788.

The Supreme Court of Nebraska then proceeds to disregard its own decisions in this case.

To justify a conviction for receiving stolen property, it is necessary that the prosecution prove by sufficient evidence that the petitioner had knowledge that the property received was

stolen property at the time of the receipt thereof. There are other sections to cover the situation where a person conceals and possesses stolen property, which he finds is stolen after an innocent receiving, but the defendant was not charged under such sections.

In giving Instruction No. 4, the trial Court failed to instruct that it was the duty of the prosecution to establish by the evidence that the petitioner knew that the cigarettes in question had been stolen at the time he allegedly received them. It was never established by testimony of any of the state's witnesses that the petitioner, James H. McKee, knew at the time that he allegedly received the cigarettes or at any time thereafter, that the cigarettes had been stolen. Guilty knowledge has been declared an essential element in the offense of receiving stolen property. The Nebraska Supreme Court has held in *State v. Henry*, 174 Neb. 432, 118 N.W. 2d 335, *St. Clair v. State*, 103 Neb. 125, 169 N.W. 554, *Egan v. State*, 97 Neb. 731, 151 N.W. 237, that guilty knowledge is an element of a crime of receiving stolen property, and that the state is required to plead and prove that the petitioner received the property, knowing it to have been stolen, with the intent to defraud the owner thereof.

The evidence was insufficient to establish guilty knowledge on the part of the petitioner at the time of receiving, and the Court erred in failing to instruct that guilty knowledge at the time of receiving was a factor to be considered by the jury in reaching its verdict.

The Court, in its opinion (183 Neb. 754, 758), held:

"As we view the evidence, it is amply sufficient to sustain the verdict * * * it further sustains the finding that these cigarettes were sold or attempted to be sold and possessed under circumstances leading to *a reasonable inference* of

guilty knowledge on the part of the defendant that the property was stolen." (Emphasis added)

The Court, in its opinion at page 758, then set forth the trial Court's instruction:

"No. 1. That the defendant, James H. McKee, did receive goods of the value of $100.00 or upward that had been stolen, with intent to defraud the owner thereof."

The Court further held:

"It is difficult to see how the Court could have instructed in clearer language that *the jury was required to find beyond a reasonable doubt* that the defendant received the goods; that they were stolen; and that he received them with intent to defraud the owner thereof." (Emphasis added)

The error is apparent that the evidence was insufficient and the jury could not have found guilty knowledge on the part of the petitioner beyond a reasonable doubt, when the Nebraska Supreme Court could only find from the evidence that the circumstances in the evidence lead to a reasonable inference of guilty knowledge.

CONCLUSION

This is not just another criminal case arising out of a state court proceeding and affirmed by a state supreme court. In this case the Nebraska Supreme Court has disregarded its own previous decisions, Nebraska statutes, and basic rules of criminal evidence in an effort to affirm this case. The Nebraska Supreme Court has misstated the facts and erroneously concluded that the conviction should be affirmed. These matters require consideration by this Court.

Petitioner, therefore, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nebraska so that justice may be done to him and the Constitution upheld.

Respectfully submitted,

RICHARD J. BRUCKNER,
WARREN C. SCHREMPP
Counsel for Petitioner

Omaha, Nebraska
July 15th, 1969

APPENDIX "A"

Opinion and Judgment of The Supreme Court of Nebraska

State of Nebraska, Appellee v. James H. McKee, Appellant.
183 Neb. 754, 164 N.W. 2d 434.

Filed January 24, 1969. No. 36889.

1. *Criminal Law: Indictments and Informations.* Generally, an information which alleges all of the facts and elements necessary to constitute the offense described in the statute is sufficient.

2. *Criminal Law: Venue.* In a prosecution for receiving stolen property under Section 28-508, R.R.S. 1943, such prosecution may be laid in the county where a defendant either received or had such property, notwithstanding the theft was committed in another county.

3. *Criminal Law: Evidence.* In a prosecution for receiving stolen property, if the facts known to a defendant are such that a man of his age, intelligence, and experience would know that the property was stolen, the evidence is sufficient to justify a jury in finding that such defendant had guilty knowledge.

Appeal from the district court for Platte County: C. Thomas White, Judge. Affirmed.

Schrempp, Rosenthal, McLane & Bruckner, Warren G. Albert, and James R. Welsh, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for Appellee.

Heard before White, C. J., Carter, Spencer, Boslaugh, Smith, McCown, and Newton, J.J.

White, C. J.

This is a criminal prosecution under Section 28-508, R.R.S. 1943, for receiving stolen property with the intent to defraud the owner. From a jury verdict of guilty and a judgment and sentence thereon, the defendant appeals. We affirm the judgment.

The defendant's first contention is that the information does not state the facts which constitute the offense of receiving stolen property, under the above statute. The information provides in part as follows: "James H. McKee late of the County aforesaid, on or about the 23rd day of May, A. D., 1967 in the County of Platte, and the State, aforesaid, then and there being, did then and there *feloniously receive goods of the value of over $100 that had been stolen, with the intent to defraud the owner thereof, the said James H. McKee knowing the said goods to have been stolen,* all contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska." (Emphasis supplied)

The information is phrased in substantially identical language of the statute. The rule is when an information alleges all of the facts and elements necessary to constitute the offense described in the statute it is sufficient. Hans v. State, 147 Neb. 67, 22 N.W. 2d 385; McKenzie v. State, 113 Neb. 576, 204 N.W. 60; Chadek v. State, 138 Neb. 626, 294 N.W. 384. We note further that the defendant failed to move against the information by way of demurrer, motion to quash, or plea of

abatement. Under the applicable statute, Section 29-1812, R.R.S. 1943, the defendant has waived all defects that may be raised thereby. There is no merit to this contention.

The defendant complains that the venue of the case in Platte County, Nebraska, is improperly laid because the State has failed to prove that the act of receiving the stolen property occurred in Platte County, Nebraska. Our applicable statute, Section 29-1307, R.R.S. 1943, specifically provides that the prosecution of the receiver of any personal property that shall have been feloniously stolen may be laid in the county where he received or *had such property*, notwithstanding the theft was committed in another county. The evidence shows that Ferer's Tobacco & Candy Company in Omaha, Nebraska, was burglarized and approximately 60 cases of cigarettes were taken. The company does not sell at wholesale to any retail outlets in Platte County, Nebraska, where this prosecution was initiated. The evidence is that the company's sole outlet for its product is in the area of Omaha, Nebraska. Each package of cigarettes is stamped with the company's exclusively assigned state cigarette tax number of 28482. Each package of cigarettes received in evidence in this case was stamped by meter with the above number. The evidence also establishes that Ferer's Tobacco & Candy Company sells at wholesale to vending machine companies but that such vendors cannot sell at wholesale such cigarettes by the case but must put them in a machine for sale at retail. The evidence conclusively establishes that each package of cigarettes received in evidence was found in Platte County, Nebraska, in the possession of the defendant or had been traded for or had been purchased from the defendant by the person who had custody over these cigarettes. This evidence is obviously ample, under the precise wording of the statute, to establish proof of venue by the State in the county where the defendant "had such property". There is no merit to this contention.

Interwoven with the above argument is the next contention of the defendant that the evidence was insufficient to sustain the verdict. The evidence is that 60 cases of cigarettes were stolen from Ferer's Tobacco & Candy Company's plant in Omaha, Nebraska, on March 12, 1967. These cigarettes were received from the manufacturer and duly stamped by the Ferer Company in its Iowa plant before delivery to its Nebraska plant in Omaha for sale at wholesale in Nebraska. The company is licensed to stamp cigarettes for sale in the State of Nebraska; has an exclusively assigned number of 28482, and it is undisputed that each package of cigarettes was stamped by the company by means of its metering machine. As mentioned before, Ferer's Tobacco & Candy Company has no service outlets outside of the Omaha area and specifically no retail outlet in Platte County, Nebraska. It does sell at wholesale to vending machine operators who place them in a machine for sale at retail. All of the packages of cigarettes introduced in evidence, stamped with the company's number, were found in the possession of the defendant or had been traded for or purchased from the defendant by persons who actually had the custody of the same. More specifically the cigarettes which were identified as exhibit 4 had been purchased by one Stewart E. Halpin, a Nebraska highway patrolman, at the Avenue Bar in Columbus, Nebraska, which in turn is owned by one Tom Reilly. Reilly, in turn, had obtained the cigarettes, which were identified as exhibit 16 in the evidence, by trading the defendant some old cigarette stock. One Raymond Liss had purchased the cigarettes which were identified as exhibits 17 to and including 20 from the defendant. These in turn bore the metering stamp of Ferer's Tobacco & Candy Company, from which the 60 cases had been stolen. The balance of the cigarettes which were received in evidence, consisting of metered stamped cigarettes of Ferer's Tobacco & Candy Company, identified as exhibits 5 to and including 12 were

found in the basement of the defendant's home located at 2909 Fifteenth Street, in Columbus, Platte County, Nebraska.

The defendant complains that there is insufficient evidence to establish guilty knowledge or intent to defraud on the part of the defendant. The evidence shows that one Raymond Liss had purchased his business, Ray's Bar, from the defendant on May 1, 1967, in Platte County, Nebraska. Subsequent thereto Raymond Liss was contacted by the defendant in regard to purchasing some cigarettes at $2.25 a carton. Liss did not purchase any cigarettes from the defendant at that time. However, at a later date, Liss went to the defendant's home on some other business and the defendant again offered to sell him cigarettes this time at $2 a carton and Liss purchased the cigarettes at this price. The wholesale price at the time on regular cigarettes was $2.94 a carton and $2.84 a carton for king-size cigarettes. The defendant had a regularly issued tobacco license. In State v. Henry, 174 Neb. 432, 118 N.W. 2d 335, our court stated, on passing upon the sufficiency of evidence in this kind of a situation, as follows: "If the facts which were known to each defendant were such that a man of the age, intelligence, and experience of each defendant would know that the television sets were stolen, then the jury could find that each defendant had guilty knowledge." As we view the evidence it is amply sufficient to sustain the verdict. It shows that the exhibits, representing cigarettes, were the same cigarettes stolen from Ferer's Tobacco & Candy Company and also clearly shows that the defendant received or had said exhibits in Platte County, Nebraska. It further sustains the finding that these cigarettes were sold or attempted to be sold and possessed under circumstances leading to a reasonable inference of guilty knowledge on the part of the defendant that the property was stolen. There is no merit to this contention.

The defendant complains that the trial court erred in

failing to instruct the jury that guilty knowledge at the time of receiving was a factor to be considered by the jury in reaching its verdict. That the court properly instructed as to the element of guilty knowledge or intent to defraud is clearly demonstrated by a recital of instruction No. 4 which reads in part as follows: "Your verdict in this case must be not guilty unless you are satisfied by the evidence beyond a reasonable doubt of the truth of all three of the following material elements:

"1. That the defendant James H. McKee *did receive* goods of the value of $100.00 or upward that had been stolen, *with intent to defraud the owner thereof.*" (Emphasis supplied.) It is difficult to see how the court could have instructed in clearer language that the jury was required to find beyond a reasonable doubt that the defendant received the goods; that they were stolen; and that he received them with the intent to defraud the owner thereof.

Finally, the defendant complains that the jury verdict did not find the actual value of the goods received by him. As set out above in instruction No. 4, the court specifically required the jury, in order to find guilt, that the value of the goods be of $100 or upward. Under the evidence and this instruction no finding of receiving stolen property in a value less than $100 could have been made consistent with a verdict of guilty. The only verdicts possible, as the court submitted the case, were guilty as charged, or not guilty. It must follow, since the jury found the defendant guilty under this instruction, that it necessarily had to find the value of the goods to be $100 or upward. Defendant cites Section 29-2026.01, R.S. Supp., 1967, and Hogoboom v. State, 120 Neb. 525, 234 N.W. 422, 79 A.L.R. 1171, as authority for his position in this case. The statute and the case cited describe an offense entirely distinct and different from the offense charged in this information under Section 28-508, R.R.S. 1943. The reason for the holdings

under the authorities cited by the defendant is that the court must know for what offense it is necessary to pass judgment and sentence on. Such a situation is not present in this case nor in a prosecution under the statute. The statute involved here describes a specific offense, that of receiving stolen property of a value of more than $100 with the intent to defraud. It does not permit a determination as to degrees of guilt proportionate to the amount of property stolen. In the instructions given, or in the corresponding verdict received, there is nothing misleading or uncertain about the jury's determination of value or the necessary finding for the court to properly pass judgment and sentence.

The judgment of the district court is correct and is affirmed.

Affirmed.

APPENDIX "B"

Constitution of the United States

AMENDMENT VI – Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

28-508, R.R.S. Nebraska, 1943, provides that:

"Whoever receives or buys goods or chattels of the value of one hundred dollars, or upwards * * * shall be imprisoned in the Nebraska Penal and Correctional Complex not more than seven years nor less than one year." (Emphasis added)

28-513, R.R.S. Nebraska, 1943, provides that:

"Whoever receives or conceals any stolen property, goods, * * * of less value than one hundred dollars * * * shall, upon conviction thereof, be fined for every such offense not more than one hundred dollars, or be imprisoned in the county jail not more than thirty days." (Emphasis added)

29-2026.01, R.R.S. Nebraska, 1943, provides that:

"Jury verdict; finding of value of property; when required. When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in its verdict the value of the property stolen, embezzled, or falsely obtained."